Supreme Court, U.S.
FILED
JUN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5932

JOHN DOE AND JANE ROE,

Appellants,

v.

STATE OF DELAWARE,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF DELAWARE

BRIEF FOR APPELLANTS JOHN DOE AND JANE ROE

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June 1980

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OPINIONS BELOW

The opinion of the Supreme Court of Delaware, dated August 24, 1979, is attached to the jurisdictional statement as Appendix A; the opinion was not officially reported but excerpts are reported *sub nom. Matter of Five Minor*

Children, 407 A.2d 198.[1] Prior opinions in the same proceeding include the oral opinion of the Delaware Superior Court, delivered September 12, 1975, the order of the Delaware Supreme Court, dated September 28, 1976, and the letter opinion of the Superior Court, dated December 30, 1976. The prior opinions are attached to the jurisdictional statement, respectively as Appendices B, C, and D, but are not officially reported.

JURISDICTION

The decision of the Supreme Court of Delaware was entered on August 24, 1979, and a timely motion for reargument was filed but subsequently denied by an order entered on October 19, 1979, which is attached to the jurisdictional statement as Appendix E. The judgment of the Delaware Supreme Court was entered on the latter date and is attached to the jurisdictional statement as Appendix F. Notices of appeal were filed in the Delaware Supreme Court and the Delaware Superior Court on January 7, 1980, and are attached to the jurisdictional statement as Appendix G. On March 24, 1980, this Court noted probable jurisdiction. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(1) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the provisions

[1]Under Delaware law, the proceedings are confidential. 13 Del. Code §§1107(e), 1111 (1974).

of 13 Del. Code §§1101-13 (1974 and 1978 Supp.) are set forth in Appendix A to this brief.

QUESTIONS PRESENTED

1. Is the Delaware statute, which provides for the permanent termination of the parent-child relationship where the parent is "not fitted," unconstitutionally vague and indefinite in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. In light of the protected nature of the family relationship under decisions of this Court, does the Due Process Clause and this Court's decision in *Addington* v. *Texas*, 441 U.S. 418 (1979), preclude the termination of the parent-child relationship based upon a mere "preponderance of the evidence"?

3. Under the Due Process Clause, must the state demonstrate a compelling state interest, by making specific findings of existing or threatened harm to the child, before terminating the parent-child relationship?

STATEMENT OF FACTS

Appellants John Doe and Jane Roe ("the Does") are the natural parents of five young children: Amy, Bill, Charles, David and Ellen.[2] In December 1976, the Does' parental relationship with all of their children was permanently severed by an order of the Delaware Superior Court on the statutory ground that the Does were "not fitted" to be

[2]On March 31, 1980, this Court granted the Does' motion to substitute pseudonyms for their real names and those of their children to ensure confidentiality.

parents. 13 Del. Code §1103(4).[3] If upheld by this Court, that order would cause all parental rights and duties between the Does and their children "forever . . . to cease to exist as fully and to all intents and purposes as if [the children and their natural parents] were and always had been strangers." 13 Del. Code §1112.

A. Background

Delaware, like other states, provides a statutory procedure for permanent termination of the parent-child relationship, commonly known as a "TPR" proceeding. 13 Del. Code §§1101-13. Whereas a custody order transfers control of a child on a temporary or indefinite basis, a TPR order permanently severs all legal parental rights and duties of the parent or parents affected.[4] In practical terms, it forever excludes the parent or parents from any further contact with the child, regardless of the parents' improvement or rehabilitation.

The provision of the Delaware statute involved in this case provides for involuntary terminations of parental rights when:

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[3]Chapter 13 of the Delaware Code is reprinted in Appendix A of this brief.

[4]13 Del. Code §1112 (1974), specifying "the effect of termination," reads in pertinent part:

> "Upon the issuance of an order terminating the existing parental rights and transferring such parental rights to another person or organization, the effect of such order shall be that all of the rights, duties, privileges and obligations recognized by law between the person or persons whose parental rights are terminated and the child shall forever thereafter cease to exist as fully and to all intents and purposes as if the child and the person or persons whose parental rights have been terminated were and always had been strangers."

> "The parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights." 13 Del. Code §1103(4) (1978 Supp.).

Nothing in the statute provides any further guidance—by definition, requirement, standards or otherwise—as to what constitutes unfitness under this provision.[5] A companion provision, applicable to all terminations, makes it a condition that termination also be "in the best interests of the child" (13 Del. Code §1108(a) (1974)); but no criteria are provided for making this judgment.

The TPR proceeding in this case culminated a bitter relationship between the Does and the Division of Social Services of the Delaware Department of Health and Social Services (the "Division"). That relationship had begun several years before, when in 1972 Mr. Doe voluntarily and temporarily placed with the Division Amy and Bill, then the Does' only children, because he had lost his job and was not eligible for state assistance.[6] Although the two children were returned several months later, and the Division seemed satisfied with the family situation,[7] antagonism developed between the Does and the Division.

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[5]13 Del. Code §1103(4) (1978 Supp.) is the basic subsection governing involuntary termination; subsections (1), (2), (3) and (5) of Section 1103 deal with voluntary relinquishment, abandonment, mental incompetence and death of the parents (*id.*).

[6]Tr. 62, 67-68, 105, Dec. 7, 1976. References to "Tr." are to the TPR hearing transcripts. By order of March 31, 1980, this Court directed that the case be heard on the original record.

[7]The principal social worker testified: "The [Does] had been in their home and had obtained furniture and food, and everything seemed to be going very well." The children were "healthy" and normal in appearance. Tr. 129, Dec. 7, 1976. See also *id.* at 130-31.

Before beginning the TPR proceeding, the Division instigated two criminal actions against Mr. Doe.

First, in January 1974, the Division caused to be brought an unsuccessful prosecution against Mr. Doe for sexually assaulting his oldest child. At trial, Mr. Doe flatly denied the charges.[8] The alleged witnesses to the incident, each of whom was hostile toward the parents for other reasons (see, *e.g.*, Tr. 482, Dec. 21, 1976), either failed to appear or testified that they had never made the principal allegations attributed to them by the Division. See Tr. 150, Dec. 7, 1976. While acquitting Mr. Doe of assault, the court convicted Mr. Doe of the misdemeanor of offensive touching—with which he had not been charged—and placed him on probation.

Second, shortly after the birth of their youngest, twin children, the Division in January 1975 initiated a criminal charge of incest against John Doe and Jane Roe on the ground that they were half-brother and half-sister. Although the Division had known about this relationship since 1972 and had assured the Does that it did not disqualify them for custody (Tr. 163, Dec. 7, 1976), the criminal charge was actually filed in order to obtain control of the children.[9]

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[8]See Tr. 108-09, Dec. 7, 1976. As he testified later in the TPR case, "I put my tongue on the top of my daughter's lip and her nose playing." Tr. 75, Dec. 7, 1976. His daughter was then two years old.

[9]The notes taken by the Division representative who met with the state deputy attorney general read in pertinent part as follows:

"[The DAG] said that the only way DSS could get a TPR was if DSS also had custody of the twins, because we can't prove the [parents'] unfitness if there are children in the home. Therefore, it was decided that [the DAG] would charge both [parents] with the criminal charge of incest on 2/4/75. Then, DSS will petition for custody of the twins. The TPR for all of the three older children will follow pending the Court action over the criminal charges of incest." Parents' Trial Exhibit 21, offered at Tr. 400, Dec. 21, 1976.

After a trial in which the parents were unrepresented by counsel, they were convicted and placed on probation. Tr. 91, Dec. 7, 1976.

By this time, the Division had obtained custody of all five Doe children.[10] Nonetheless, the judge presiding at the incest trial led the Does (who were then unrepresented by counsel) to believe that their chances for regaining custody of their children would be enhanced if each would undergo medical procedures to prevent their bearing additional children. See Tr. 92-93, 112-113, Dec. 7, 1976; Tr. 340, 375-79, Dec. 20, 1976; Tr.491, Dec. 21, 1976. Eager to regain custody of their children, the Does agreed. Mr. Doe and Ms. Roe underwent such procedures on March 19, 1975 and March 26, 1975, respectively. Tr. 340, Dec. 20, 1976.

Less than a week later, on April 1, 1975, the Division informed the Does that it planned to seek termination of their parental rights. Tr. 491-92, Dec. 21, 1976. On July 2, 1975, the Division filed such a petition in Delaware Superior Court seeking to terminate parental rights of both parents with respect to all five children. The children at that time ranged in age from 8 months to 4 years. The ground specified in the petition, pursuant to 13 Del. Code §1103(4) (1978), was that the Does were not fitted to exercise parental rights. Tr. 4, Dec. 6, 1976.

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[10]Custody of Amy, Bill and Charles had been taken at the time the assault charge was filed. Tr. 136, Dec. 7, 1976. David and Ellen had been taken when the Does were jailed and unable to post bond before trial on the incest charge. Tr. 112, Dec. 7, 1976.

B. The TPR Proceeding

After a truncated hearing, the Superior Court ruled summarily on September 12, 1975, "that the incestuous relationship between the father and the mother is sufficient in and of itself for termination of parental rights." J.S. App. 5b.[11] On review, the Delaware Supreme Court remanded the proceeding (J.S. App. 1c) on the ground that the record did not contain a determination that the termination of parental rights was also "in the best interests" of the Doe children, as required under 13 Del. Code §1108(a) (1974). There followed the full-scale TPR proceeding that gives rise to this appeal.

On December 6, 1976, proceedings in the remanded TPR case commenced before the same judge who had issued the summary opinion. At the outset of the proceedings, counsel for the Does challenged the TPR statute on the constitutional grounds asserted in this appeal.[12] The Division then presented its case beginning with the introduction in evidence of a "social report" prepared by the Division. Tr. 14-15, Dec. 6, 1976. This report comprised a lengthy recitation of the "facts" respecting the family compiled from the Division records by a "writer who has no personal knowledge of the facts and circumstances." Social report, p. 1, offered at Tr. 14,

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[11]The opinions below are reproduced in the separate appendix filed with the jurisdictional statement and cited in this brief as "J.S. App. _____."

[12]See Tr. 6-10, Dec. 6, 1976, and Tr. 276, Dec. 20, 1976, reprinted in J.S. App. 1i-8i. The claims were renewed in the Delaware Supreme Court in appellants' opening brief (pp. 8-36, 63-75), reply brief (pp. 1-17), and motion for reargument (p. 112). See also Delaware Supreme Court decision, August 24, 1979, pp. 5-15 (J.S. App. 5a-15a).

Dec. 6, 1976.[13]

The Division then presented witnesses, including two psychiatrists who had never examined either the Doe parents or the children. Tr. 11, 39, Dec. 6, 1976; Tr. 176, 188, Dec. 7, 1976. Instead, assuming the facts stated in the social report to be true, the witnesses concluded that the parents lacked "nurturing" capacity (Tr. 20, Dec. 6, 1976) and were not "capable of adequately raising children." Tr. 182, Dec. 7, 1976. Other Division evidence showed that John Doe had had one episode of drunkenness several years before,[14] and that Mr. Doe had moved his family repeatedly as he changed jobs.[15] No independent evidence was introduced to show Jane Roe's unfitness.

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[13]The information in the report was avowedly "compiled . . . to support the allegations that [the Does] are unfit parents of their five children." Social report, p. 4. However, the compiler testified that she did not make any investigation beyond the Division's records to determine the truth or accuracy of the information. Tr. 500, Dec. 21, 1976.

[14]John Doe explained that the episode had followed the surrender of his two eldest children to the Division at a time when he was out of work and was unable to receive welfare and had resulted from his anxiety at the loss of his children. Tr. 105-06, Dec. 7, 1976. His current employer testified at the TPR proceeding that Mr. Doe, employed in a facility where liquor was available, was invariably sober. Tr. 389-92, Dec. 21, 1976.

[15]While the State suggested at trial that Doe's employment record reflected a lack of reliability, there was also evidence that he had lost several jobs due to the State's intervention. For example, Doe lost one job because he had to take time off to defend the criminal suits brought by the Division. See, *e.g.*, Tr. 73, Dec. 7, 1976. He lost another job because his employer was annoyed by frequent calls from the Division inquiring about Doe's "personal problems." Tr. 80, Dec. 7, 1976. With regard to the family's relocations, some of which were to short-term temporary locations arranged by the Division or other agencies, the State's own officials acknowledged that the Does lacked a car, requiring that they live near Mr. Doe's place of employment. Tr. 212-13, Dec. 8, 1976; Tr. 325, Dec. 20, 1976.

For John Doe and Jane Roe, the evidence showed that the Division itself did not regard the half-sibling relationship as establishing parental unfitness;[16] that while in the State's care, the eldest child has been moved through nine foster homes and was suffering from these changes (Tr. 241-43, Dec. 8, 1976); that both parents had voluntarily obtained counseling that was of substantial benefit to them (Tr. 494, Dec. 21, 1976); and that John Doe and Jane Roe had for the prior year maintained a stable relationship including employment of both parents at relatively substantial wages. Tr. 82, 113, Dec. 7, 1976; Tr. 389-92, Dec. 21, 1976.

The Does' employer testified that they were reliable and trustworthy employees. Tr. 389-92, Dec. 21, 1976. A psychologist, in charge of psychological services for the Division of Public Health, testified that the Does' parental rights should not be terminated and that his own interview had impressed him that there was a "good relationship" between the parents and a "strong desire to have their children back." Tr. 453-54, 457, Dec. 21, 1976.[17] This witness, unlike the State's psychiatrists, had examined and tested both parents and had also examined two of the Doe children; and a psychologist on his staff had examined a third. Tr. 449, 461, Dec. 21, 1976.

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[16]The Division's own social-worker representative had assured the parents that their relationship itself was not disqualifying (Tr. 163, Dec. 7, 1976), and its psychiatric witnesses either disclaimed reliance on the relationship (Tr. 32, Dec. 6, 1976) or essentially ignored it (Tr. 176-200, Dec. 7, 1976) in their testimony.

[17]When custody of the children was taken from the parents, the court provided for visitation rights. However, the Division refused to allow such visits and successfully resisted an application by John Doe to enforce their right to visit their children. See Parents' Trial Exhibits 15, 18, offered respectively at Tr. 336, 343, Dec. 20, 1976.

A week later, the Superior Court issued a three-page letter determining that the best interests of the children would be served by terminating the Does' parental relationship with their children. J.S. App. 3d. The court described the parents' "pattern of living" as reflecting moves from job to job and "frequent[] resort to the obtaining of public financial assistance in order for them and their children to exist." *Id.* These factors, together with "the moral atmosphere, the incestuous relationship between the parents, and the past conviction of [John Doe]" were cited by the court, without any further explanation. *Id.* At the same time, the court found that during the past year the parents' "employment record and place of living has remained stable" (*id.*), but the court provided no explanation of why these circumstances were discounted or disregarded.

On review, the Delaware Supreme Court affirmed the permanent termination of the Does' parental rights. J.S. App. 15a. It found that the statutory phrase "not fitted" meant "unfitted for parental duties" and was not unconstitutionally vague, indefinite or overbroad. J.S. App. 7a. Rejecting a higher burden of proof than preponderance of the evidence, the court distinguished *Addington* v. *Texas,* 441 U.S. 418 (1979) (requiring a higher standard for civil commitment) on the ground that termination of parental rights "is a civil proceeding, not a penal one . . . ." J.S. App. 10a. Turning to the evidence,[18] the Delaware Supreme

[18]The Delaware Supreme Court found that it was improper to admit the social report in evidence "in light of the fundamental parental rights at stake" (J.S. App. 12a), but it concluded that the facts relied on by the Superior Court were established by independent evidence. *Id.* Since the Division's own experts testified on the assumption that the entire social report was accurate and relied directly upon it (see p. 42, n.68, below), the Delaware Supreme Court apparently assumed—without any basis—that the Superior Court was not influenced by the expert testimony.

Court then decided in substance that (1) the asserted incest rendered the parents unfit and (2) multiple jobs and moves and the prior convictions established that the best interests of the children would be served by termination. J.S. App. 12a-15a. Finally, the opinion criticized the trial court's exclusion of evidence concerning the inadequacy of the foster home placement of the Doe children and the Division's lack of planning for their future, but it deemed the evidentiary rulings not to be reversible error. J.S. App. 15a.

A timely motion for re-argument was filed on September 5, 1979, renewing the constitutional attacks based on the vagueness of the statute, the inadequate standard of proof and substantive due process. On October 19, 1979, the Delaware Supreme Court denied without opinion the motion for re-argument. J.S. App. 1e. This Court noted probable jurisdiction on March 24, 1980.

SUMMARY OF ARGUMENT

The Delaware statute at issue in this case provides for the permanent termination of parental rights of parents found "not fitted" to exercise such rights where the court also finds that the "best interests" of the child will be served by termination. 13 Del. Code §§1103(4), 1108(a) (1978 Supp., 1974). The statute neither defines nor provides any standards or criteria for applying these extraordinarily vague phrases. Yet, the remedy is the most drastic step possible in relation to a family: a TPR order means that all rights and duties between parent and child "shall forever thereafter cease to exist" as if "the child and [its natural parents] were and always had been strangers." 13 Del. Code §1112.

The relationship between parent and child is "constitutionally protected" (*Quilloin* v. *Walcott,* 434 U.S. 246,

255 (1978)), for "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ." *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944). Statutory terms comparable in vagueness to "not fitted" and "best interests" have been condemned repeatedly by this Court, which has insisted that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963). In judging family conduct, unnecessary vagueness is an invitation to *ad hoc,* personal and subjective judgments. Because Delaware can provide greater specificity and guidance in its standards, as other states have done, it is clearly obliged to do so.

Contrary to Delaware's position, the State is also obliged to establish the grounds for termination by clear and convincing evidence and not merely by the preponderance of evidence, as in ordinary suits for money damages. This Court has ruled that in certain civil proceedings "the individual's interest in the outcome . . . is of such weight and gravity that due process requires the state to justify [its action] by proof more substantial than a mere preponderance of the evidence." *Addington* v. *Texas,* 441 U.S. 418, 427 (1979). All of the criteria which required a "clear and convincing" standard in *Addington* are present in this case, including a significant state impact on highly valued constitutional interests, stigma resulting from the State's action, and the high risk of subjective and arbitrary judgment. In addition, the permanency of the termination remedy makes this an even stronger case than *Addington* for requiring the higher burden of proof.

Such a requirement of clear and convincing evidence serves practical as well as symbolic ends. It expresses the high "degree of confidence" our society demands before permanently depriving parents of their own children; it is a

counterweight to the danger that unfitness may be determined based upon the private values of the fact finder; and it serves as a partial check on the momentum of state intervention directed for the most part at the poor and helpless. See *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977).

Finally, under the Constitution, "the dismemberment of [the] family" (*Stanley* v. *Illinois*, 405 U.S. 645, 658 (1972)) cannot be ordered without findings that the parental conduct in question has caused or threatens imminently to cause significant harm to the child. Only clear proof of a compelling state interest can justify the extreme remedy of depriving parents forever of the "companionship, care, [and] custody" of their own children. *Id.* at 651. The only interest that could be so compelling is the prevention of harm to the child.

As this case illustrates, requiring explicit and supported findings of harm is essential to assure that the compelling state interest actually exists in the case at hand. Such an "individualized" determination is required by due process (*Stanley* v. *Illinois, supra*, 405 U.S. at 655, 657) for harm cannot be merely conjectured or presumed. A judgment of parental unfitness, not grounded in actual or imminent harm specifically found, provides no reasonable basis for terminating parental rights. Instead, it makes such termination solely a form of punishment cruel and unusual to the parents and affirmatively harmful to the child.

ARGUMENT

I.

THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

The Delaware TPR statute provides for termination of parental rights of parents who are found to be "not fitted to continue to exercise parental rights." 13 Del. Code §1103(4) (1978 Supp.). This statute—whose language is almost circular—offers no guidance as to what constitutes unfitness, forcing courts, state officials and parents to guess at its meaning. The companion "standard" for terminating parental rights, that termination be "in the best interests of the child" (13 Del. Code §1108(a) (1974)), is similarly imprecise; no criteria are offered for assessing a child's best interests. These "standards," affecting constitutionally protected interests of the most precious and fundamental kind, fail to satisfy long-established due process requirements of definiteness and specificity.

This Court's decisions "establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore* v. *City of East Cleveland,* 431 U.S. 494, 503 (1977) (plurality opinion). The Court repeatedly has struck down state attempts to violate the integrity of the family, for:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder .... And it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944).

For example, this Court has recognized that traditional parental authority to "establish a home and bring up children" is sheltered by the Fourteenth Amendment's Due Process Clause.[19] Similarly, this Court's decisions have held that due process must be accorded to family members' rights to mutual association and companionship—most particularly to the rights of parents to the "companionship, care and custody" of their children.[20]

In this case the State seeks not merely to limit traditional parental authority or to regulate the conditions of "companionship, care and custody." Through the TPR proceeding, Delaware sunders the family itself by abrogating the reciprocal relationship between parent and child, a relationship that this Court has expressly held to be "constitutionally protected." *Quilloin* v. *Walcott,* 434 U.S. 246, 255 (1978). The irrevocable consequences of such state action are devastating. The parents lose forever rights of custody, visitation, instruction and upbringing of the children that they have conceived and nurtured. Delaware law expressly provides that upon issuance of a TPR order, all rights and duties between parent and child "shall forever thereafter cease to exist" as if "the child and [its natural parents] were and always had been strangers." 13 Del. Code §1112 (1974).[21]

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[19]*Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925); *Ginsberg* v. *New York,* 390 U.S. 629, 639 (1968); *Wisconsin* v. *Yoder,* 406 U.S. 205, 232 (1972).

[20]*Stanley* v. *Illinois, supra,* 405 U.S. at 645, 651; *Moore* v. *City of East Cleveland, supra,* 431 U.S. at 501; *Smith* v. *Organization of Foster Families,* 431 U.S. 816, 844 (1977).

[21]Just as the parents lose parental rights, so the child is deprived permanently of the benefit of parental duties. Where parental rights are terminated, each "child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for the period during which he is subject to the code, but forever." *In re K.S. & M.S.,* 33 Colo. App. 72, 76, 515 P.2d 130, 133 (1973).

When the State seeks so drastic a remedy, it is obligated to provide a standard of "a greater degree of specificity than in other contexts," a standard proportionate to the preciousness of the interests and relationships at stake.[22] Indeed, this Court has insisted that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[23] This Court has also held that the standard of specificity and precision is not relaxed for statutes "adopted for the salutary purpose of protecting children." *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 689 (1968).

It is difficult to imagine statutory standards more imprecise that those of the Delaware TPR statute. A standard that poses the question whether parents "are not fitted to continue to exercise parental rights" (13 Del. Code §1103(4) (1978 Supp.)) is at least as vague as language that this Court has found unconstitutional in prior cases. For example, the terms "acceptable," "proper," and "not suited for young persons," were found unconstitutionally vague in *Interstate Circuit, Inc.* v. *Dallas, supra,* 390 U.S. at 676. Nor is the companion "best interests" language (13 Del. Code §1108(a) (1974)) more specific. *Gelling* v. *Texas,* 343 U.S. 960 (1952), invalidated the similar standard "such character as to be prejudicial to the best interests of the people."[24] This Court itself described as "vague" the "best

[22]*Smith* v. *Goguen,* 415 U.S. 566, 573 (1974). *Accord, Colautti* v. *Franklin,* 439 U.S. 379, 391 (1979); *May* v. *Anderson,* 345 U.S. 528, 533 (1953).

[23]*NAACP* v. *Button,* 371 U.S. 415, 438 (1963). *Accord, Buckley* v. *Valeo,* 424 U.S. 1, 41, 76 (1976).

[24]In a recent concurring opinion joined by four justices, Mr. Justice Stevens addressed the "best interests" standard in another context and observed: "That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values" whose enforcement cannot be reconciled with the constitutional interests being protected. *Bellotti* v. *Baird,* 443 U.S. 622, 655 (1979).

interests of the child" standard as a test in child custody proceedings. *Smith* v. *Organization of Foster Families, supra,* 431 U.S. at 835, n.36.[25] When a definite standard is required even for so mild a disability as court costs, surely an indefinite standard cannot be a basis for terminating parental rights.[26]

Relying on the principles established by this Court, two federal courts—the only federal courts that have addressed vagueness challenges to TPR statutes—have invalidated TPR statutes employing language indistinguishable from that involved here. In *Roe* v. *Conn,* 417 F. Supp. 769 (M.D. Ala. 1976), the offending language authorized termination of parental rights of those whose homes were "unfit" and "improper." Recognizing the circular and opaque character of the statutory standard, the court held Alabama's TPR statute unconstitutionally vague:

> "Obviously [what is 'unfit' and 'improper'] is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical and religious views. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their proscription, the statute is unconstitutionally vague." 417 F.Supp. at 780.

Similarly, the Iowa TPR statute, employing the terms "unfit" and "necessary parental care and protection," was

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[25]See also *Staub* v. *City of Baxley,* 355 U.S. 313, 322 (1958) ("effects upon the general welfare of the citizens"); *Musser* v. *Utah,* 333 U.S. 95, 97 (1948) ("injurious to public morals"). See generally Amsterdam, "The Void-For-Vagueness Doctrine in the Supreme Court," 109 *U. Pa. L. Rev.* 67, 90 (1960).

[26]See *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966), holding invalid the imposition of court costs based on standards of "misconduct" and "reprehensible conduct."

invalidated in *Alsager* v. *District Court,* 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd per curiam on other grounds,* 545 F.2d 1137 (8th Cir. 1976). The court declared:

> "[A]rbitrary and discriminatory parental terminations are inevitable . . . . The termination of the parent-child relationship in any given case may thus turn upon which state officials are involved in the case, rather than upon explicit standards reflecting legislative intent. This danger is especially grave in the highly subjective context of determining an approved mode of child-rearing." 406 F.Supp. at 18-19.[27]

In addition to these federal court decisions, at least two state supreme courts have invalidated TPR statutes containing language virtually identical to that upheld below. *Davis* v. *Smith,* 266 Ark. 112, 583 S.W.2d 37 (1979) (en banc) ("parents . . . unable to provide a proper home"); *Linn* v. *Linn,* 205 Neb. 218, 286 N.W.2d 765 (1980) ("best interests and welfare of the children"). The TPR statutes struck down in *Roe, Alsager, Davis* and *Linn,* like the Delaware TPR statute, lack "the first essential of due process," for each statute contains "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926).[28]

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[27]Although in *Alsager* the Court of Appeals did not reach the vagueness issue it did admonish: "[B]oth the vagueness and overbreadth attacks upon these provisions are serious ones. By declining to affirm on these grounds, however, we afford the Iowa courts an additional opportunity to give the statutory provisions a plainly desirable limiting construction." 545 F.2d at 1138.

[28]Civil commitment statutes containing vague language similar to that of the Delaware TPR statutes have been held unconstitutionally vague by numerous federal courts. *E.g., Johnson* v. *Solomon,* 484 F. Supp. 278, 283 (D. Md. 1979) ("best suited to the physical, mental and moral welfare of the child consistent with the public interest"; "in need of assistance"); *Stamus* v. *Leonhardt,* 414 F. Supp. 439, 451 (S.D. Iowa 1976) ("best interest"); *Goldy* v. *Beal,* 429 F. Supp. 640 (M.D. Pa. 1976) (three-judge court) ("need of care").

The Delaware TPR statute entails each of the basic vices of vague statutes. The term "not fitted" fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972). Even more important, the statutory vagueness authorizes enforcement of the drastic TPR remedy "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 109. Thus:

> "The use of an indeterminate standard means that state officials may decide on the basis of unarticulated (perhaps even unconscious) predictions and preferences that could be questioned if expressed. Because of the scope of discretion under such a standard, there is a substantial risk that decisions will be made on the basis of values not widely shared in our society." Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy," 39 *Law & Contemp. Prob.* 226, 263 (1975).

The same danger has been expressly recognized by this Court.[29]

Moreover, this problem is particularly dangerous in the highly subjective area of child-rearing.[30] Thus, "[m]any

[29]See *Musser* v. *Utah, supra,* 333 U.S. at 97, where this Court observed that the phrase "injurious to public morals" would encompass "almost any act which a judge or jury might find at the moment contrary to his or its notion of what was good for health, morals, trade, commerce, justice or order [and might depend on] the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling."

[30]See M. Phillips, A. Shyne, E. Sherman & B. Haring, *Factors Associated With Placement Decisions in Child Welfare,* 69-84 (1971). Phillips *et al.* conducted a simulation study designed to analyze the factors influencing a judge's decision to remove a child from its parents' home. Three judges, each with at least five years experience, were independently given the actual files for 94 children. They agreed on the appropriate disposition in only 45 of 94 cases. Yet, "even in cases in which they agreed on the decision, the judges did not identify the same factors as determinants, each seeming to operate to some extent within his own unique value system." *Id.* at 84.

decisions reflect the personal biases of judges and appear to result from a disapproval of the parents' lifestyles rather than an impartial judgment that the child would be harmed."[31] Moreover, available appellate review of TPR orders is "rendered inoperative" by the statutory vagueness, which "shield[s] from appellate scrutiny any judicial prejudice, discrimination or value imposition that may have affected the tribunal's decision."[32]

Finally, by failing to identify specific harms that justify termination or to specify criteria by which to evaluate TPR petitions, the vague statutory standard "increase[s] the likelihood that decisions to intervene will be made in situations where the child will be harmed by intervention."[33] Thus, in *Alsager* v. *District Court, supra,* the court observed that the unduly vague Iowa statute had allowed "improvident physical separations and final terminations." 406 F. Supp. at 23. Thus, the imprecise statutory language threatens the welfare of children, as well as the constitutional rights of their parents.[34]

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[31]"Developments in the Law—The Constitution and the Family," 93 *Harv. L. Rev.* 1156, 1318 n.60 (1980). Among examples given were removal or custody orders issued in substance to "punish parents' immaturity or choice of lifestyles which run afoul of the judges' notion of propriety." *E.g., In re New England Home For Little Wanders,* 367 Mass. 631, 328 N.E.2d 854, 887 (1975) (mother "took an unrealistic approach to her problems"); *Matter of Sherol A.S.,* 581 P.2d 884, 888 (Okla. 1978) (social worker found parents " 'very lazy and lacking in initiative' ").

[32]*Interstate Circuit, Inc.* v. *Dallas, supra,* 390 U.S. at 684-85; Developments, *supra,* 93 *Harv. L. Rev.* at 1234 n.222.

[33]Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 *Stan. L. Rev.* 985, 1001 (1975). *Accord,* Mnookin, *supra,* 39 *Law & Contemp. Prob.* at 270.

[34]This case demonstrates the dangers of unwarranted removal caused by statutory vagueness. While there were no findings whatever that the children were harmed by their relationship with their parents (see pp. 34-44, below), uncontradicted evidence showed that Amy, the oldest child, bore substantial emotional scars due to her experiences in being shuttled through nine foster homes in five years of state custody. Tr. 241-42, Dec. 8, 1976.

The TPR proceedings in this case illustrate these failings. For example, the Superior Court's finding of "unfitness" was based substantially on the parents' half-sibling relationship. Yet every other State official familiar with the family circumstances—including another Delaware judge—had rejected the view that that relationship rendered the Does unfit parents.[35] Similarly, the Superior Court's finding of "best interests" was expressly premised on the parents' "pattern of living." J.S. App. 3d. Yet, the elements of that lifestyle—frequent changes in residence or employment and reliance on public assistance—are typical of a vast segment of the American population. See p. 40 and n.66, below. The lower courts suggested no reason why termination of parental rights would be in the best interests of the Doe children, but not in the best interests of other children raised by poor families or subject to frequent changes in residence.

Vague statutory standards and their attendant vices are *not* inherent in the problems addressed by TPR statutes. There are numerous alternatives to the Delaware TPR statute that could substantially increase the precision of the statute. Thus, Delaware could specify determinate standards that indicate to parents, courts and state officials when termination of parental rights is appropriate. See, *e.g.*, Tex. Code Ann. Tit. 2 §15.02(1) (1979) (reprinted in Appendix B). With or without definite standards, the

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[35]The Family Court judge who presided at the incest trial and who issued various custody orders affecting the Doe children advised the parents that their relationship would not bar their regaining custody. See Tr. 92, 113, Dec. 7, 1976; Tr. 379, Dec. 20, 1976; Parents' Trial Exhibit 10, offered at Tr. 334, Dec. 20, 1976. The Division's own social-worker representative had offered the parents similar assurances. Tr. 163, Dec. 7, 1976. The Division's psychiatric witnesses disclaimed reliance on the relationship (Tr. 32, Dec. 5, 1976) or essentially ignored it in their testimony. Tr. 176-200, Dec. 7, 1976.

legislature could identify criteria relevant to a TPR adjudication; such criteria would focus the virtually unlimited discretion of Superior Court judges under the present statute and provide a framework for appellate review. See, *e.g.*, Mich. Comp. Laws Ann. § 722.23 (1979 Supp.) (reprinted in Appendix B).

Alternatively, the State could implement structural changes in the TPR adjudicatory process, varying the standards and criteria for TPR determinations depending upon objective circumstances (*e.g.*, whether less severe alternatives, such as therapy, had been explored; how long the children had been outside the parents' custody). Such an approach has been suggested by the IJA/ABA Juvenile Justice Standards Project.[36] In fact, structural reform, determinative standards and relevant criteria were all included in the model TPR provisions recently drafted by an independent panel of experts and endorsed by the then Department of Health, Education and Welfare.[37]

Whatever scheme a state may choose, there is clearly an opportunity to develop statutory language that limits the potential for "arbitrary and discriminatory" application. *Grayned* v. *City of Rockford, supra,* 408 U.S. at 108. What is fatal here is Delaware's total failure, either by legislation or judicial gloss, to provide any guidance whatever to narrow, clarify or refine the bare statutory terms currently used by the State to render parents and their natural children

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[36]See Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Project: Standards Relating to Abuse and Neglect* § § 2.1-2.2, 8.2-8.4 (tent. draft 1977).

[37]This model legislation was prepared pursuant to the Child Abuse, Prevention and Treatment and Adoption Reform Act, P.L. 95-266, Apr. 24, 1978, § 203. The proposed model act, as approved by the Secretary, has been published in the Federal Register, 45 Fed. Reg. 10622-99 (Feb. 15, 1980).

"strangers" by force of law. 13 Del. Code §1112 (1974).[38]

There is no slide-rule calculation for determining when statutory language is unconstitutionally vague, but Delaware's TPR statute is condemned by every criterion. Its standards are brief, general and almost circular; it affects rights of a most precious character; it invokes a drastic and permanent remedy; it virtually invites discriminatory, *ad hoc* and subjective determinations; and, above all else, it is vastly more vague and indefinite than it needs to be, in light of existing alternative ways to provide greater guidance. The Delaware TPR statute, unnarrowed by any judicial gloss, should be declared unconstitutional on its face.

II.

IT IS UNCONSTITUTIONAL TO TERMINATE PARENTAL RIGHTS BASED ON A MERE PREPONDERANCE OF THE EVIDENCE.

In ruling that the Does were not fit parents and that the best interests of their children required termination of parental rights, the Delaware Superior Court employed the "preponderance of the evidence" standard of proof ordinarily used in civil actions for money damages. The termination of parental rights, affecting severely the funda-

[38]Contrary to the State's assertion, the Delaware Supreme Court has not narrowed the statute by interpretation. Compare Delaware motion to dismiss or affirm, pp. 10-11. On the contrary, the Delaware Supreme Court has asserted only that "not fitted" means "unfitted for parental duties" and that "unfitness does not require precise definition to be constitutionally sound." J.S. App. 7a. In an earlier case, similarly refusing to offer a narrowing construction, the Delaware Supreme Court asserted that "each case must be decided on its own peculiar facts." *In re Dingee*, 328 A.2d 139, 140 (Del. 1974).

mental right of family integrity, requires clear and convincing evidence. This conclusion is consistent with the constitutional criteria set forth by this Court in standard of proof cases; it reflects the interests involved in TPR cases which are illustrated by the facts of this case; and it is supported by numerous lower court authorities requiring clear and convincing evidence in TPR cases.

It is well settled that "the right . . . to raise one's children" is essential, and that the "liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment is impaired by the permanent separation of parents and children. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). Summarizing illustrative decisions, the Court there stated:

> "The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights,' *May v. Anderson,* 345 U.S. 528, 533 (1953). . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra,* at 399 . . . ."

What "due process" is required varies with the right affected and the nature of the State's action; but where family rights are at stake, this Court has insisted upon a high standard of procedural protection in a variety of contexts.[39]

Notwithstanding "civil labels and good intentions," "the individual's interest in the outcome . . . [may be] of such weight and gravity that due process requires the state to

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[39] *E.g., Armstrong v. Manzo,* 380 U.S. 545 (1965) (notice for termination of rights); *May v. Anderson,* 345 U.S. 528 (1953) (personal jurisdiction over parent required to transfer custody); *Stanley v. Illinois, supra,* 405 U.S. 645 (hearing on termination).

justify [its action] by proof more substantial than a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 427 (1979). In *Addington*, this Court held that civil commitment to a mental institution required the use of the "intermediate standard" of clear and convincing evidence (403 U.S. at 425), part way between a mere preponderance and proof beyond a reasonable doubt.[40] The Court stressed the "significant deprivation of liberty" involved in the state action (*id.* at 425); the "adverse social consequences" or "stigma" resulting from an adverse state determination (*id.* at 426); the possible risk that liberty will be impaired "based solely on a few isolated instances of unusual conduct" (*id.* at 427); and, above all, the "weight and gravity" of the individual's interest in the outcome of the proceeding. *Id.*[41]

Under the criteria of *Addington*, a similar requirement of clear and convincing evidence is warranted in TPR proceedings. As in *Addington*, the "weight and gravity" of the parents' interest in the TPR proceeding are very great and infinitely more important than the "mere loss of money." 441 U.S. at 424. For most couples, their children are their most important shared purpose and interest, and the permanent severance of this family relationship involves a deprivation of liberty at least as significant as the temporary

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[40]See also *In re Winship*, 397 U.S. 358 (1970) (civil juvenile delinquency proceeding); *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) (civil libel action involving First Amendment protection).

[41]These same considerations have repeatedly been stressed by the Court in setting burden of proof requirements, whether resting on the Constitution or on the Court's supervisory power. See, *e.g.*, *Woodby v. INS*, 385 U.S. 276 (1966) (loss of liberty from deportation); *In re Winship*, *supra*, 397 U.S. at 367 (loss of liberty and stigma in juvenile delinquency proceeding); *Rosenbloom v. Metromedia*, *supra*, 403 U.S. at 50 (risk of error and preciousness of First Amendment rights).

isolation involved in *Addington* and *Winship.* Due process restrictions have been applied to prevent constraints on family autonomy far less intrusive than the permanent separation of parents and children.[42]

This case also resembles *Addington* in three other respects: obvious stigma is attached to a determination that parents are "unfit" to raise their children;[43] the same "possible risk" of an adverse determination based on "unusual conduct" or "idiosyncratic behavior" is present (441 U.S. at 427) because both cases involve an evaluation of "life styles"; and while there may be no threat of jail, a clear form of physical separation from one's family is imposed when a parent is told he or she may no longer live in the same household or have any other continuing relationship with his or her own child.[44] If the standards applied in

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[42]For example, the Court has protected the right of parents to direct the education of their children (*e.g., Meyer v. Nebraska, supra,* 262 U.S. 390); the right of an extended family to dwell together (*Moore v. City of East Cleveland, supra,* 431 U.S. 494); and the right of an expectant working mother to resist fixed maternity leave (*Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974)).

[43]This concern, stressed in *Winship* as a constitutional matter, is also present in civil cases where a higher burden of proof has traditionally been imposed by common law. Classic examples are the widely applied requirement of clear and convincing evidence where charges of fraud or undue influence are made. See 9 Wigmore, *Evidence* §2498 (3d ed. 1940).

[44]This consideration alone distinguishes *Vance v. Terrazas,* 48 U.S.L.W. 4069 (Jan. 15, 1980). That case, decided by a five-to-four vote, sustained expatriation based on a preponderance of the evidence, but it did so only in the face of an explicit Congressional directive and a stringent *substantive* standard of expatriation affording additional protection to the individual. Moreover, to the extent Congress has expressed a judgment on the standard of proof to be applied in TPR proceedings, it is decidedly in favor of a standard at least as demanding as clear and convincing evidence. See pp. 33-34, below.

Addington are followed, clear and convincing evidence is required in this case as well.

Indeed, TPR proceedings involve one element, not present in *Addington,* that strongly supports the use of a higher burden of proof. While civil commitment or a juvenile delinquency conviction involves at worst a temporary loss of liberty, a TPR determination is by its very nature permanent, once it has become final on appeal. It is unlike other steps the state may take in dealing with the family, steps that may be discontinued or reversed, such as social-worker visits or temporary custody orders. Under the Delaware TPR statute, a termination of parental rights and duties means that they "shall forever thereafter cease to exist" (13 Del. Code §1112 (1974)); and the state is immediately free to make new permanent arrangements for the child, including its adoption by new parents. No form of state action, other than the death penalty, is so certain to be irreversible. Thus, the more stringent burden of proof should be used "to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for [the] particular type of adjudication' " here involved.[45]

The State's argument for a lower standard of proof appears to rest on the proposition that *Addington* juxtaposed the rights of the individual with those of the state, while a termination proceeding — in Delaware's view — involves a conflict of interests between the parents and their children. However, the higher burden of proof does not protect the parents' interests alone but also the rights of children to the care and protection of their parents. *See* p. 16, n.21, above. There is, in substance, a strong constitutional interest in

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[45] *Addington v. Texas, supra,* 441 U.S. at 423, quoting *In re Winship, supra,* 397 U.S. at 370 (Harlan, J., concurring).

favor of the integrity and autonomy of "the family as a unit." *Parham v. J.R.*, 442 U.S. 585, 602 (1979). The children have no presumptive competing interest in escaping their natural family and entrusting themselves to the care of state agencies or foster families where the state may assign them.

The constitutional presumption that parents and children have a common interest in remaining together is grounded in fact as well as the values of our civilization. It is a near certainty that *some* injury will be done to the children when the family is wrenched apart, for "the very fact of removal from even an inadequate natural family is often traumatic for the child."[46] No corresponding certainty exists that the child will be better off in an unknowable future of foster homes or state institutions.

> "[T]here is substantial evidence that, except in cases involving very seriously harmed children, we are unable to improve a child's situation through coercive state intervention. In fact, under current practice,coercive intervention frequently results in placing a child in a more detrimental situation than he would be in without intervention." Wald, *supra*, 27 *Stan. L. Rev.* at 993 (footnote omitted).

If anything, the interests of the children reinforce a need for a high standard of proof before their relationship with their parents is finally and irrevocably terminated.

Substantively, as well as formally, a termination pro-

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[46]*Smith v. Organization of Foster Families, supra*, 431 U.S. at 837 n.40. See J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 31-35 (1973), describing the almost certain adverse consequences of changes in routine and separation from parents in infancy, in younger years, and even for school age children. "Psychologists unanimously agree that removal from the home, even a comparatively 'bad' home, will itself usually cause the child serious psychological injury." Developments, *supra*, 93 *Harv. L. Rev.* at 1320 (footnote omitted).

ceeding is a conflict between the parents and the state, not between the parents and their children. The state's interests are not identical to those of the children. It would blink reality to ignore the interests of the state welfare bureaucracy whose *raison d'etre* is intervention, the presence of a large foster-care establishment financially dependent on state intervention, and the fact that "terminations aid the state in meeting the demand for 'adoptable' children while also relieving it from financial costs of long-term foster care, home-maker services, and other welfare or public services."[47] Indeed, the state's momentum toward intervention, coupled with its greater resources, threaten to magnify "the risk of error" for the individual (*Addington v. Texas, supra,* 441 U.S. at 423) unless checked by a demanding burden of proof.[48]

While the higher burden of proof has a symbolic value, it serves practical interests as well, interests amply illustrated by this case. The Doe children, including virtual infants, were severed from their parents on evidence led by "expert" testimony by two psychiatrists who had never met either of the parents or their children. See p. 9, above. Evidence also included a "social report," comprising hearsay compiled by

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[47] *State ex rel. Juvenile Department of Multnomah County v. Wade,* 19 Or. App. 314, 527 P.2d 753 (1974), *appeal dismissed,* 423 U.S. 806 (1975), quoted and discussed in Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 *Georgetown L.J.* 887, 893-94 (1975). See also *Smith v. Organization of Foster Families, supra,* 431 U.S. at 834-35, discussing the asserted "hostility of agencies to efforts of natural parents to obtain the return of their children" and the reasons alleged for this bias.

[48] How powerful that momentum may be is illustrated by this case. Although the State had known of the Does' half-sibling relationship for many years, it brought a *criminal* incest proceeding against them for the extraordinary specific purpose of assisting the State to obtain control of the children. See p. 6 and n.9, above.

a writer who admitted having "no personal knowledge of the facts and circumstances" (social report, p. 1), reflecting an extensive but onesided account of the Doe family's history.[49] The incest charge emphasized by the courts was discounted by the State's own witnesses and the Division of Social Services. See p. 10 and n.16, above. The State's evidence of the Does' numerous relocations and intermittent unemployment and welfare applications mirrors the experience of a vast number of Americans. See pp. 40-41, below.

By contrast, a psychologist who examined both of the parents and several of the children testified to the "good relationship" between the parents and their "strong desire to have their children back." Tr. 457, Dec. 21, 1976. Their employer testified that they were reliable employees. See p. 10, above. The trial court admitted that their employment record and place of living had remained stable during the prior year. See p. 11, above. No direct evidence was offered that the Does had caused harm to any of the children. See pp. 34-44, below. No one can say with any certainty that the Does would have lost their parental rights if termination had been conditioned on findings, based on clear and convincing evidence, that they were unfit and that their children's interest would best be served by granting termination.[50]

Finally, a requirement of clear and convincing evidence finds substantial support in the authorities, including both cases and statutes. Two decisions by federal district courts

[49]Having secured the introduction of the lengthy and prejudicial hearsay document, the State then proceeded to object repeatedly to the parents' evidence on a variety of grounds, including hearsay. *E.g.*, Tr. 291, 340, 375-77, Dec. 20, 1976, Tr. 394, 427, Dec. 21, 1976.

[50]Given the inherent vagueness of the substantive standards applied, it is literally impossible to prove that the fact finder would necessarily reach the same ultimate conclusion in the face of a higher burden of proof.

require clear and convincing evidence in TPR proceedings as a matter of constitutional right.[51] In addition, a number of state decisions have adopted the standard for TPR or custody proceedings within recent years,[52] and an additional number of states require the standard by statute.[53] At least two cases — the federal decision in *Alsager* and the state decision *In the Interest of G.M.* — rely directly on the analogy to civil commitment. The latter case, decided by the Texas Supreme Court after *Addington,* relied directly on *Addington* and concluded:

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[51]*Alsager v. District Court, supra,* 406 F. Supp. at 25; *Sims v. State Department of Public Welfare,* 438 F. Supp. 1179, 1194 (S.D. Tex. 1977), *rev'd on other grounds,* 442 U.S. 415 (1979).

[52]*E.g., Dale County Dept. of Pensions v. Robles,* 368 So.2d 39, 42 (Ala. Civ. App. 1979); *Caruso v. Superior Court,* 100 Ariz. 174, 412 P.2d 463, 467 (1966); *Matter of Adoption of J.S.R.,* 374 A.2d 860, 864 (D.C. App. 1977); *In Interest of C.K.G.,* 365 So.2d 424 (Fla. App. 1978); *In re Abdullah,* 80 Ill. App.3d 1144 (1980); *In Interest of Kerns,* 225 Kan. 746, 545 P.2d 187 (1979); *In Interest of Jackson,* 312 So.2d 912 (La. App. 1975); *Matter of Welfare of Rosenbloom,* 266 N.W.2d 888, 889-90 (Minn. 1978); *In Interest of Souza,* 204 Neb. 503, 283 N.W.2d 48 (1979); *Matter of Guardianship of R.,* 155 N.J. Super. 186, 382 A.2d 654, 657 (1977); *In the Interest of G.M.,* 596 S.W.2d 846 (Tex. 1980); *In Interest of Pitts,* 535 P.2d 1244, 1248 (Utah 1975); *In re Maria, Elisa, and Norma C.,* 5 Fam. Law Rptr. 2089 (Terr. Ct. U.S.V.I. 1978); *In re Sego,* 82 Wash.2d 736, 513 P.2d 831 (1973); *In re Willis,* 207 S.E.2d 129, 140 (W. Va. 1973); *In re X, Y, and Z,* 607 P.2d 911 (Wyo. 1980).

[53]*E.g.,* Alaska Stat. Ann. §47.10.080 (1979) Cal. Civ. Code §232(a)(7) (1980 Supp.); Ga. Ann. Stat. §24A-2201(c) (1976); Iowa Code Ann. §600A.8 (1979 Supp.); Mich. Comp. Laws Ann. §722.25 (1979 Supp.); Mo. Stat. Ann. §211.447 (1980 Supp.); N.H. Rev. Stat. Ann. §170-C:10 (1978); N.M. Stat. Ann. §40-7-4 (1979 Supp.); N. Dak. Cent. Code §27-20-44(2) (1974); 42 Pa. Cons. Stat. Ann. §6341(c) (Purdon); Tenn. Code Ann. §37-229(c) (1977); W. Va. Code §49-6-2(c) (1980 Supp.); Wis. Stat. Ann. §48.31(1) (1979).

> "The right to enjoy a natural family unit is no less important than the right to liberty which requires at least a clear and convincing standard of proof to inhibit such liberty through involuntary and indefinite confinement in a mental institution. Termination is a drastic remedy and is of such weight and gravity that due process requires the state to justify termination of the parent-child relationship by proof more substantial than a preponderance of the evidence. Hereafter, the 'clear and convincing evidence' standard of proof will be required in all proceedings for involuntary termination of the parent-child relationship." *In the Interest of G.M., supra,* 596 S.W.2d at 847.

Recently, an independent expert panel recommended to the then Department of Health, Education and Welfare a model state adoption act. See p. 23 and n.37, above. The model act specifically provides that involuntary termination of parent-child relationships shall be made "only . . . upon clear and convincing evidence" that the circumstances specified in the statute do exist. 45 Fed. Reg. at 10676. In the associated commentary, the drafters explained that the model act "requires this rigorous standard of proof as a protection of the fundamental rights at stake in a termination proceeding" in light of the fact that a "parent has a constitutionally protected liberty interest in the family relationship." *Id.* at 10678.

Finally, it is highly significant that Congress has explicitly regulated state TPR and custody proceedings involving Indian children and specially addressed the burden of proof standard. Foster care placement may be ordered in such proceedings only on a specified determination "supported by clear and convincing evidence"; and "termination of parental rights" may be ordered only upon "evidence beyond a reasonable doubt."[54] The House Report observed

[54]See Indian Child Welfare Act of 1978, 25 U.S.C. § §1912 (e), (f) (1978 Supp.), which are reprinted as Appendix C to the brief and discussed at pp. 38-39, below.

that "the committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty...." H. Rep. No. 95-1386, 95th Cong., 2d Sess. 22 (1978).[55]

III.

DUE PROCESS FORBIDS TERMINATION OF PARENTAL RIGHTS ABSENT A COMPELLING STATE INTEREST EVIDENCED BY FINDINGS OF HARM TO THE CHILD.

The final error committed by the lower courts is the severance of the Does' parental relations with their children without any supported determination that such a severance was necessary to protect the children against existing or imminent harm. The Constitution requires such a demonstration, for without it the state interest necessary to justify this drastic remedy does not exist. The substantive issue squarely presented by this case should be decided even if the Court determined to reverse on one or both grounds set forth in Parts I and II of this brief.[56]

It is settled that the "liberty" protected by the Fourteenth Amendment to marry and raise children (see pp. 15-16, 24-

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[55]"Where the State initiates a civil proceeding to deprive [the parent] of the custody of her children," the case "by its very nature resembles a criminal prosecution." *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, 959 (1971) (Black, J., dissenting from denials of review).

[56]If the Delaware statute is held unconstitutionally vague, as we submit it should be, then Delaware and other legislatures are likely to enact new legislation. It is thus a timely and appropriate occasion for this Court to rule on the recurring substantive issue raised by Part III of this brief.

25, above) is afforded "both substantive and procedural protection." *Smith v. Organization of Foster Families, supra,* 431 U.S. at 842 (footnote omitted). The constitutional interest of a parent in the "companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' " *Stanley v. Illinois, supra,* 405 U.S. at 651. When the state undertakes an "intrusive regulation of the family" then "the usual judicial deference to the legislature is inappropriate" (*Moore v. City of East Cleveland, supra,* 431 U.S. at 499); and such regulation can only be justified by a compelling or substantial state interest proportionate to the constitutional right being invaded.

This Court has repeatedly required such a compelling or substantial state interest, where fundamental rights are involved, in a variety of contexts.[57] The same requirement is reflected in practically all of this Court's decisions protecting family rights, from *Meyer v. Nebraska* through *Moore v. City of East Cleveland*; few, if any, of the cases could have been decided the same way if the state were required merely to demonstrate the same type of rational relation to a permissible state goal that is sufficient for ordinary economic legislation.[58] The question posed, therefore, is *what*

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[57]*E.g., Roe v. Wade,* 410 U.S. 113, 155 (1973) (decision whether to bear children); *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972) (right to vote); *Shapiro v. Thompson,* 394 U.S. 618, 638 (1969) (interstate travel).

[58]In *Meyer,* for example, the Court recognized that the invalid statute's general purpose of fostering proficiency in the English language was permissible (262 U.S. at 398-99), and in *Moore v. City of East Cleveland,* the Court acknowledged that "preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue burden on East Cleveland's school system" were "legitimate goals" served

(continued)

governmental interest is sufficiently compelling or important to justify the extreme remedy of a permanent separation of parents from their natural children.

The answer must be that to justify a remedy so severely affecting the fundamental right to raise one's own child, the state must show parental behavior evidencing significant harm to the child, either actual or imminent. Indeed, this Court has already explicitly rejected the notion that the state could constitutionally "force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[59] However, if the requirement of unfitness is to be more than an abstraction readily ignored, then the unfitness must be related to protecting the child against harm caused by parental conduct.

The need for a showing of existing or imminent harm is reinforced by practical considerations. Without this leash, the concept of unfitness has a promiscuous capacity to reflect merely the personal taste or standards of a single social worker or judge. Findings of unfitness, detached from

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(footnote continued from preceding page)
marginally by the condemned ordinance. 431 U.S. at 499-500.

The problem in such cases is not that the goal is frivolous or the means completely arbitrary but rather that, where fundamental constitutional rights are concerned, mere rationality is not enough. Instead, "this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499. See also, *e.g., Stanley v. Illinois, supra,* 405 U.S. at 652 ("legitimate interests, well within the power of the State"); *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 641 ("continuity of instruction is a significant and legitimate educational goal").

[59]See *Quilloin v. Walcott, supra,* 434 U.S. at 255, quoting *Smith v. Organization of Foster Families, supra,* 431 U.S. at 862-63 (Stewart, J., concurring).

examination of actual impact on the child, are notoriously liable to be based only on someone's view that the parents' lifestyle is eccentric, unusual or unfortunate.

> "For example, courts have removed children because the parents were not married; because the mother 'frequent[ed] taverns' or had men visitors overnight; because the parents adhered to 'extreme' religious practices, or lived in a communal setting; or because the parent was a lesbian, a homosexual, or the mother of an illegitimate child. In none of these cases was there evidence of harm to the children." Wald, *supra*, 27 *Stan. L. Rev.* at 1033 (footnote citations omitted).

Only by focusing the fact finder on the need to determine harm can the potential for arbitrary action be diminished. Harm may not be measurable in every case with ruler-like precision; but the standard is a model of objectivity compared with an undirected inquiry into fitness at large.

Lastly, without a requirement of harm, a continuing danger exists that TPR proceedings will be perverted into means of punishing the parents for conduct that, however improper, is essentially unrelated to protection of the child. The automatic equation of incest with unfitness in this very case was, at best, nothing more than a groundless presumption that parents who are half-brother and half-sister are incapable of caring for an existing child.[60] At worst, the automatic equation of a "Class A misdemeanor" (J.S. App. 12a) with unfitness amounts to mere punishment of the parents, unrelated to protection for the child and therefore a form of punishment patently cruel and unusual.[61] Unless

[60]No evidence exists that half-sibling parents are inherently less affectionate or capable. In fact, the position of the Division and its trial experts is inconsistent with any such suggestion. See p. 10 and n. 16, above.

[61]No one can doubt that to terminate parental rights as punishment for a crime would be cruel and unusual under the Eleventh Amendment. See generally *Trop v. Dulles*, 356 U.S. 86 (1958).

parental conduct is shown to cause or threaten harm to the child, it is constitutionally irrelevant in a termination proceeding.

The constitutional requirement of harm to justify taking children from their parents has been recognized by the lower federal courts. Thus, in *Roe v. Conn, supra,* 417 F. Supp. at 779, a three-judge district court struck down a statute that permitted removal of a child from "an unfit or improper home," saying in part:

> "States . . . may abrogate [parental] rights only to advance a compelling state interest and pursuant to a narrowly-drawn statute restricted to achieve only the legitimate objective . . . . The State's interest, however, would become 'compelling' enough to sever entirely the parent-child relationship only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."

Other courts have taken the same view.[62] This Court has not had occasion to specify the "showing of unfitness" that is a constitutional precondition to "forc[ing] the breakup" of a natural family, *Quilloin v. Walcott, supra,* 434 U.S. at 255; but its discussion "strongly suggests" that "actual or imminent harm to the child" is required before such intervention may be triggered. Developments, *supra,* 93 *Harv. L. Rev.* at 1319.

In the Indian Child Welfare Act of 1978, Congress expressly required a determination of harm before termi-

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[62] *E.g., Alsager v. District Court, supra,* 545 F.2d at 1137, in which the Eighth Circuit held that the state had "failed to exhibit the threshold harm necessary to give the state a compelling interest sufficient to justify permanent termination of the parent-child relationships." See also *State v. Robert H.,* 118 N.H. 713, 393 A.2d 1387, 1391 (1978) ("showing of specific harm" required); *Matter of Sherol A.S., supra,* 581 P.2d at 888 (termination permitted only to "protect children from HARM") (capitalized in original).

nation of parental rights may be ordered under state law for Indian children. See p. 33, n.54, above. The statute states:

> "No termination of parental rights may be ordered in such proceeding [under state law] in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualifed expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f) (1978 Supp.).

Such a requirement of harm is equally feasible and appropriate here.

In this case, both lower courts found unfitness solely because the Does were half-brother and half-sister and the state legislature had made incest a crime. The Superior Court in its first opinion said that "the Court is prepared to rule at this time that the incestuous relationship between the father and mother is sufficient in and of itself for the termination of parental rights." J.S. App. 5b.[63] After the Delaware Supreme Court affirmed this determination on the explicit ground that "the General Assembly has made incest a Class A misdemeanor" and had declined to modify the provision in adopting a new criminal code. J.S. App. 12a-13a. Whether or not half-sibling marriage is a crime under Delaware law, the State has not legislatively found that half-sibling parents are necessarily incapable of raising existing children; and the State offered no evidence to support such a presumption or inference in this case. Moreover, this Court has repeatedly disallowed irrebuttable

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[63]On initial review, the Delaware Supreme Court remanded the case because the Superior Court had not made the further determination of "best interests" required by 13 Del. Code §1108(a). The Superior Court's second opinion was addressed explicitly to the best interests issue. J.S. App. 1d, 3d.

presumptions as a basis for denying constitutional rights.[64]

The determination that the Doe children's "best interests" were served by terminating parental rights similarly does not rest on any findings demonstrating existing or imminent harm to the children. Certainly no findings of harm were explicitly made either by the Delaware Superior Court or the Delaware Supreme Court, and explicit findings of harm are requisite to meet the constitutional standard.[65] Even if a finding of harm could be inferred in a case where the findings made permitted no other possible inference, certainly no such inference is rationally compelled by the findings actually made by the Superior Court with respect to the Doe children's best interests.

The principal findings of the Superior Court relate to the Does' alleged "pattern of living": "frequent moving from place to place," many jobs held by Mr. Doe for short periods, and "frequent[] resort to the obtaining of public financial assistance [by the Does] in order for them and their children to exist." J.S. App. 3d. The fact is that job changes, moves from one residence to another, and resort to welfare are the lot of a vast number of Americans.[66] Nothing in the Superior

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[64]For example, in *Stanley v. Illinois, supra,* 405 U.S. at 654-55, this Court held that the state could not irrebuttably presume that all unmarried fathers are unsuitable and neglectful parents. In *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 645-46, the Court held unjustified an automatic and conclusive presumption that an expectant woman was incapable of working past an arbitrary date.

[65]Absent such findings, there is no way to be certain that the proper constitutional standard has been applied by the court terminating the rights of the parents. Such findings should serve the same role as a determination of malice or reckless disregard in a libel case affecting First Amendment rights. *E.g., Rosenbloom v. Metromedia, supra,* 403 U.S. 29.

[66]According to the 1979 *Statistical Abstract of the United States,* between 20 and 30 million people lived below the poverty level in this country each year between 1968 and 1977, the last reported year (*id.* at 462); unemployment has generally been at a rate of 5 to 8 percent (*id.* at 404); and between 1965 and 1970, 47 percent of the population moved. *Id.* at 39.

Court's findings distinguishes the Does in this respect from thousands of other families, and surely nothing demonstrates that the children were harmed or threatened with imminent harm by this "pattern of living."[67]

This Court has itself noted the dangerous tendency, among those who administer the official child care system, to assume that "the natural parents' poverty and life style [is] prejudicial to the best interests of the child." *Smith v. Organization of Foster Families, supra,* 431 U.S. at 834. It is not surprising that "perhaps the most prevalent characteristic of families charged with neglect is poverty." Areen, *supra,* 63 *Georgetown L.J.* at 888. Only by insisting on clear evidence of actual or imminent harm to the child, which certainly has not been shown in this case, can courts prevent the dangerous and destructive confusion between being poor and being an unfit parent.

None of the other "facts" mentioned by the Superior Court demonstrates harm to the children. The half-sibling relationship proves nothing whatever about the parents' capacity to raise their existing children. See p. 10, n.16 and p. 39, above. The prior conviction of Mr. Doe for offensive touching involved a charge flatly denied by Mr. Doe (see Tr. 108-09, Dec. 7, 1976) relating to alleged misconduct occurring three years prior to the 1976 TPR proceeding; and the Superior Court made no independent finding concerning the charges and no finding whatever of harm to any of the children. Finally, Mr. Doe's alleged "alcoholic problem" (J.S. App. 2d) concerns an episode occurring in 1973, at a time when the Doe children were not even in their parents'

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[67]There is one piece of evidence in the record that directly discloses harm to any of the children; and that is the harm inflicted on Amy, the eldest child, as a result of her treatment while in the *State's* custody. See p. 10, above.

care (Tr. 62, Dec. 7, 1976); and Mr. Doe's employer testified at trial that Mr. Doe was invariably sober even though he was employed in a facility where liquor was available. Tr. 389-92, Dec. 21, 1976.

This is in substance a case in which five young children were permanently barred from a home admittedly stable, in both location and employment of the parents, at the time of the TPR order (see J.S. App. 3d) with no finding of actual or imminent harm to the children. The principal expert testimony for the State was provided by two psychiatrists who had never examined the children or the parents. See p. 9, above. Instead, they both testified based on a double hearsay "social report"[68] so untrustworthy that the Delaware

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[68]For example, the State's principal psychiatrist testified in response to a hypothetical question, based on the stated assumption that "all material facts contained [in the social report] are true," that termination served the children's best interests. Tr. 12-13, 15, Dec. 6, 1976. Asked for his reasons, the psychiatrist began as follows: "The reasons are based on the report again and are based on the instability, geographic instability, as well as the emotional instability, of multiple moves. There is also indicated that there did exist an incapacity — really an inability of the two parents to provide this. The nurturance and the stability that are required for the optimum, let alone average, developments of the ordinary human infant would seem, on the basis of that record, to be beyond that capacity." *Id.* at 15-16. The psychiatrist continued in this vein until finally he was asked about the parents' capacity for change; he then replied: "I saw no evidence in the summary [sic: social] report of the capacity for change." *Id.* at 20.

The other State psychiatrist, who testified more briefly, gave his opinion in response to a hypothetical question that read as follows: "Assuming, for the purposes of this question, that the facts contained in that report are true and correct, based upon your professional qualifications and based upon your analysis of the report, and assuming the facts contained therein to be true and accurate, do you have an opinion of Mr. and Mrs. [Doe]'s ability to continue to exercise parental rights over their five children?" Tr. 181, Dec. 7, 1976.

Supreme Court later found it inadmissible (J.S. App. 11a-12a) even though that court improbably deemed its admission to be "harmless error." See p. 11, n.18, above.

By contrast, the psychologist who had actually examined the Does and several of the children testified that parental rights should not be terminated and that he had found a "good relationship" between the parents and their children, as well as a "strong desire" by the Does to have their children back. Tr. 457, Dec. 21, 1976. There was also testimony that the children were generally normal (Tr. 129-31; Dec. 7, 1976), except that the eldest child had suffered from her foster home experience. Tr. 241-43; Dec. 8, 1976. The Superior Court, of course, made no findings of harm, so the question whether the record would even support findings of harm does not arise.

This Court's "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[69] Required findings of actual or imminent harm would not impose an extraordinary or unjustified burden upon the State,[70] when considered in relation to the seriousness of the charge (that parents are unfit to raise their own children) and the proposed remedy (that they be permanently severed from further contact).

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[69]*Moore v. City of East Cleveland, supra,* 431 U.S. at 503 (footnote omitted). See also *Smith v. Organization of Foster Families, supra,* 431 U.S. at 842.

[70]Indeed, Congress has in substance prescribed such findings in the Indian Child Welfare Act of 1978. See pp. 38-39, above. Even if the requirement were burdensome, which it is not, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois, supra,* 405 U.S. at 656 (footnote omitted). See also *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 646.

Rather, such a requirement would ensure that courts confront and resolve the cardinal question whether there actually exists that compelling state interest — the protection of the children against harm from their parents — which alone justifies "the dismemberment of [the] family." *Stanley v. Illinois, supra,* 405 U.S. at 658.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

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June 1980

APPENDIX A

United States Constitution, amendment XIV, section 1, clause 3, provides:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law."

13 Delaware Code § §1101-1113 (1974 and 1978 Supp.), provide:

§1101. Definitions.

As used in this chapter:

(1) "Abandoned" shall be interpreted as referring to any child who, for a period of 6 months, has not received any regular and reasonable financial help from his parent or parents or any person having parental rights or responsibility and on whose behalf no substantial contacts have been initiated by his parent or parents or any person having parental rights or responsibility during that period.

(2) "Authorized Agency" means any agency licensed by the Department of Health and Social Services of this State to place children for adoption, or any agency duly approved, certified, recognized or licensed by the proper authority of any other state in which that agency is located to place children for adoption.

(3) "Child" means any male or female who has not attained his or her 18th birthday.

(4) "Mentally incompetent" shall be interpreted as referring to a parent who is unable to understand and discharge the natural and regular obligations of care and support of a child by reason of mental illness, psychopathology, mental retardation or mental deficiency.

(5) "Natural father" means the biological male parent of a child.

§1102. Jurisdiction and venue.

(a) The Superior Court shall have jurisdiction of proceedings under this chapter to terminate parental rights.

(b) A petition for termination of parental rights may be filed in the Superior Court of any of the following counties:

(1) The county in which the petitioner resides;

(2) The county in which the organization having legal or physical care, custody or control of the child involved is located;

(3) The county in which the child involved is located.

(c) Whenever the Superior Court shall assume jurisdiction of a child for the purposes of this chapter, it shall be deemed to have retained jurisdiction for the purposes of proceeding under Chapter 9 of this title relating to adoption.

§1103. Grounds for termination of parental rights.

The procedure for termination of parental rights for the purpose of adoption or, if a suitable adoption plan cannot be effected, for the purpose of providing for the care of the child by some other plan which may or may not contemplate the continued possibility of eventual adoption, may be initiated whenever it appears that:

(1) The parent or parents of any child, or the person or persons or organization holding parental rights over such child, desires to relinquish such parental rights; or

(2) Any child has been abandoned; or

(3) The parent or parents of any child or any person or persons holding parental rights over such a child are found by the Court to be mentally incompetent and, from evidence of 2 qualified psychiatrists selected by

the Court, found to be unable to discharge parental responsibilities in the foreseeable future. The Court shall appoint a licensed attorney as guardian ad litem to represent the alleged incompetent in the proceeding;

(4) The parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights; or

(5) Both parents of a child are deceased.

Unless adoption is contemplated, the termination of 1 parent's parental rights by the other parent shall not be granted if the effect will be to leave only 1 parent holding parental rights, unless the Court shall find the continuation of the rights to be terminated will be harmful to the child.

§1104. Persons eligible to petition for termination of parental rights.

A petition for the termination of parental rights may be filed by any of the following:

(1) The mother or the natural father, or both, of a child born out of wedlock;

(2) Both parents of a child born in wedlock if both parents are living;

(3) The surviving parent of a child born in wedlock, if 1 parent is dead;

(4) The mother or the natural father, or both, if the mother's legal husband at the time of the conception or birth of the child was not the natural father of the child. In the absence of evidence to the contrary, a notarized statement of the legal husband that he is not the father of the child shall be prima facie proof thereof;

(5) One parent alone if the other parent is incompetent by virtue of mental illness or mental retardation, or has abandoned the child, or is not fit to continue to exercise parental rights;

(6) A blood relative of a child whose parents are deceased or who are incompetent by virtue of mental illness or mental retardation, or who have abandoned the child, or who are not fitted to continue to exercise parental rights;

(7) An authorized agency or the State Department of Health and Social Services.

§1105. Contents of petition.

(a) The petition for the termination of parental rights shall state the:

(a) Name and place of residence of the petitioner or petitioners;

(2) Name, sex and date of birth of the child;

(3) Relationship of the petitioner or petitioners to the child or the fact that no such relationship exists;

(4) The names and addresses of the parents of the child if born in wedlock;

(5) If the child was born out of wedlock, the name and address of the mother and her marital status at the time of the child's conception and birth, and, in the event she was married at the time of the child's conception or birth, the name and address of the mother's husband at those times, and an affidavit by the mother setting forth either (i) the name and last known address of the natural father, or (ii) a statement that the mother knows the name of the natural father but is unwilling to disclose the name of the natural father, or (iii) a statement that the mother does not know the name of the natural father, or (iv) the name of the natural father, and a statement that the mother has

never known his address;

(6) Name and last known address of the person or persons or organization holding parental rights and the name and address of the person or persons or organization having the care, control or custody of the child;

(7) Grounds for termination of parental rights;

(8) Name and address of the person or persons or of the authorized agency or officer thereof or the State Department of Health and Social Services or officer thereof for whom or for which parental rights are requested;

(9) In addition to other pertinent information, the petition shall, if the name and/or address of the natural father is not included, furnish detailed information concerning the efforts made to identify and locate the natural father so as to enable the Court to determine what further steps, if any, should be taken.

(b) Any consents required in §1106 of this title shall accompany the petition as exhibits.

(c) In any case in which a petition for the termination of parental rights has been filed and an authorized agency or the State Department of Health and Social Services is a party to the proceedings, there shall be attached to the petition a social report.

§1106. Consent requirements; waiver of notice.

In the case of proceedings based on §1103(1) of this title:

(1) A petition for the termination of parental rights shall be accompanied by the duly notarized consent in writing of the person or persons or organization holding parental rights;

(2) The consent provided for in subdivision (1) shall be required from:

a. Both parents of a child born out of wedlock; provided, however, that the consent of the alleged natural father need not contain an admission that he is the father. In the event that the named natural father disclaims paternity, an affidavit signed by him to that effect shall be attached to the petition in lieu of a consent from the natural father. It is further provided that in the event of a petition containing statements described in §1105(a)(5)(ii), (iii) or (iv) of this title, after a hearing in which it is established on the record that the mother and father of the child are not living together as husband and wife openly and that they have not done so nor married since the birth of the child, the Court may, following consideration of the social report, dispense with the requirement of the father's consent in compliance with §1113 of this title.

b. Both parents of a child born in wedlock except as provided in subparagraph c. if both parents are living, or from the survivor, if 1 is deceased, regardless of the marital status of the parents at the time the petition is presented;

c. The mother and the natural father, if the mother's legal husband at the time of the conception or birth of the child was not the natural father of the child. In the absence of evidence to the contrary, a notarized statement of the legal husband that he is not the father of the child shall be prima facie proof thereof. If such a notarized statement of the legal husband cannot be obtained, a notice of hearing shall be sent to him as provided in §1107 of this title. The consent of the natural father is subject to paragraph a. above;

d. Any other person or persons or organization holding parental rights;

e. One parent alone if the other parent is incompetent by reason of mental illness or mental retardation, or has abandoned the child, or is not fitted to continue to exercise the parental rights.

(3) If the individual in whom the right to consent exists is under the age of 21 years, this fact shall not be a bar to the giving of consent nor render the consent when given invalid;

(4) Every petition shall be accompanied by a formal written consent executed by the person or persons or organization for whom or for which parental rights are requested;

(5) If the person or persons or organization holding parental rights wish to waive their right to any and all notice of hearing or right to appear at such hearing, the petition shall be accompanied by a notarized statement to this effect executed by the person or persons or organization holding parental rights;

(6) Consent by the natural father may be executed either before or after the actual birth of the child involved.

§1107. Hearing procedure; notice of hearing; report.

(a) When a petition for the termination of parental rights is filed in which an authorized agency or the State Department of Health and Social Services is a party to the proceedings, the Court shall set a date for a hearing thereon, and shall cause notice of the time, place and purpose of the hearing to be served upon the parent or parents, person or persons or organization holding parental rights at his or their last known address; provided, however, no such notice shall be necessary if a waiver executed by the parent or parents, person or persons or organization holding parental rights has been filed with the petition, in accordance with the

provisions of §1106(5) of this title. The Court may require notice to be served upon any other person or organization.

(b) If the Court shall find that personal service within the State cannot be accomplished upon the parent or parents, person or persons or organization holding parental rights, the Court shall then cause notice of the time, place and purpose of the hearing to be published once a week, for 3 successive weeks, in such newspapers of the county, 1 or more, as the Court may judge best for giving the parent or parents, or person or persons or organization holding parental rights notice, the formal wording of said notice to be approved by the Court. Such publication shall constitute conclusive evidence of service and a hearing will then proceed at the time and date set with or without the appearance of the parent or parents, person or persons or organization so notified. Publication shall also be made in the locality in which the parent or parents, person or persons or organization holding parental rights is believed to be located if different from the county where the publication just described has been caused. If any publication is ordered pursuant to this subsection, the Court shall also order that the Prothonotary, at least 3 weeks prior to the hearing, shall send by regular and registered or certified mail to the parent or parents, or person or persons or organization holding parental rights, at the address or addresses given in the petition, a copy of the same notice, or a similar notice of the time, place and purpose of the hearing.

(c) Personal service at any time prior to the hearing shall be sufficient to give jurisdiction.

(d) When a petition for termination of parental rights is filed, and an authorized agency or the Department of Health and Social Services, Division of Social Services, is not a party to the proceedings, the Court shall, before any hearing,

order a social study and report on the petition by an authorized agency or by the Department of Health and Social Services, to be filed within 4 months, subject to such additional time as the Court shall determine is reasonably required. The Court shall set a date for hearing to take place after the report is to be filed and notice shall be accomplished as outlined above. Any social report filed with the petition, or subsequently, as described above in this subsection, shall include the information specifically referred to in §1105(c) of this title, where indicated.

(e) All hearings shall be held before the Court privately, but for reasons appearing sufficient to the Court the hearing in any particular case may be public.

§1108. Order of termination and transfer of parental rights.

(a) Should the Court find the termination of existing parental rights and their transfer to be in the best interests of the child, it shall make an order terminating such rights in the parent or parents, person or persons or organization in which they have existed and transferring them to some other person or persons or authorized agency or the State Department of Health and Social Services as may, in the opinion of the Court, be best qualified to receive them.

(b) If a child is abandoned by 1 parent only, the rights of such parent may be terminated without affecting the rights of the other.

(c) In the case of the termination of the parental rights of 1 parent only, for the purposes of adoption by a stepparent, upon the finding described in paragraph (a) of this section, the Court may, in its discretion, in lieu of a final order enter

an interlocutory order which the Court shall make final at the completion of adoption proceedings, provided that any such interlocutory order which does not become final within 18 calendar months of the issuance thereof shall, upon the expiration of such 18 calendar month period, become null and void.

§1109. Appeal.

The petitioner, if the petition is not granted; or any person or organization whose parental rights have been terminated by the order, may, at any time within 30 days after the making and entry of such decree, take an appeal therefrom to the Supreme Court.

§1110. Court costs.

All Court costs including costs of giving notice and advertising shall be paid by the petitioners.

§1111. Confidential nature of records.

All records and dockets pertaining to any termination shall be confidential and shall be kept by the Prothonotary in a sealed container which shall be opened only by the order of a Judge of the Superior Court.

Anyone wishing to inspect any of the papers filed in connection with any termination shall petition a Judge of the Superior Court setting forth the reasons for the inspection. The Judge may refer the petition to the State Department of

Health and Social Services or to an authorized agency for investigation and report. If, in the opinion of the Court, the information is necessary, and the interests of the child, the natural parents or the adoptive parents will not be prejudiced by its disclosure, the Court shall issue an order permitting the release of the information and setting forth the terms under which it shall be released.

§1112. Effect of termination of parental rights.

Upon the issuance of an order terminating the existing parental rights and transferring such parental rights to another person or organization, the effect of such order shall be that all of the rights, duties, privileges and obligations recognized by law between the person or persons whose parental rights are terminated and the child shall forever thereafter cease to exist as fully and to all intents and purposes as if the child and the person or persons whose parental rights have been terminated were and always had been strangers. The person or organization to whom said parental rights are transferred shall have custody and guardianship of the child but such custody and guardianship shall terminate automatically upon the entry of another order transferring parental rights or on an order of adoption.

§1113. Interpretation.

This chapter is designed to achieve without undue delay the paramount objective of the best interest of the child, and all questions of interpretation shall be resolved with that objective in mind.

APPENDIX B

Mich. Comp. Laws Ann. §722.23 (1979 Supp.) provides:

"Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:

(a) The love, affection and other emotional ties existing between the competing parties and the child.

(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the education and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the competing parties.

(g) The mental and physical health of the competing parties.

(h) The home, school and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

Tex. Code Ann. Tit. 2 §15.02 (1979) provides:

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

APPENDIX C

Indian Child Welfare Act of 1978, 25 U.S.C. § §1912(e), (f) (1978 Supp.), provides in pertinent part:

> (e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> (f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.